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In the Supreme Court of the United States

OCTOBER TERM, 1957

CLYDE EUGENE GARNER, AUDREY HART GARNER, HORACE G. TWITTY, OREN CLOUD FESMIRE, SAMMY JOE GARNER, EDD JOHN MAYO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 24–27) is reported at 244 F. 2d 575.

JURISDICTION

The judgment of the Court of Appeals was entered on May 13, 1957 (Pet. 23). A petition for rehearing was denied on June 25, 1957 (Pet. 28). The petition for a writ of certiorari was filed on July 19, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the evidence supports the verdicts finding petitioners guilty of a single conspiracy to distill, and deal in, illicit liquor.

2. Whether, after an extensive main body of instructions substantially distinguishing the indictment charge from evidence, the trial judge erred in refusing an instruction that, although the jury was permitted to have the indictment, "* * * you are again instructed" that the indictment is not itself evidence.

STATUTES INVOLVED

The pertinent sections of 18 U. S. C., and of the Internal Revenue Codes of 1939 and 1954, relating to conspiracy and to distilled spirits, are set forth in the Appendix, *infra*, pp. 14–18.

STATEMENT

Petitioners seek review of the judgment of the Court of Appeals for the Sixth Circuit (Pet. App. 23) affirming the judgments of the District Court for the Western District of Tennessee, imposed upon the verdicts of a jury (R. 136a)[1] finding petitioners guilty of conspiracy to violate the internal revenue laws relating to distilled spirits.[2] The evidence for the government may be summarized as follows:

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[1] Record designations followed by the letter "a" refer to the printed Appendix filed by petitioners below; designations followed by the letter "b" refer to the printed Appendix filed by the government below.

[2] The sentences imposed were as follows: Clyde Garner, three and one-half years; Audrey Garner, 18 months; Twitty, three and one-half years; Fesmire, 18 months; Sammy Garner, 18 months; and Mayo, one year. Fines of $10,000 and $5,000 were imposed, respectively, on Clyde and Audrey Garner (R. 137a).

Clyde and Audrey Garner owned about four or five hundred acres of farmland in Tennessee, held in Audrey's name (R. 76b). Twitty lived at their house and Sammy Joe Garner, a nephew, across the road (R. 52b, 48a). Fesmire was a tenant of the Garners (61b).

From September to November 1954, 16,000 pounds of sugar were purchased from one retail grocery by Clyde and Audrey Garner and Twitty. One time, Sammy Joe Garner picked up 2,000 pounds for which Audrey Garner later made payment (R. 48a, 62a–64a, 66a, 52b–53b, 57–59b). On occasions, the amounts purchased were larger than the retailer's stock on hand, so that arrangements were made to have the sugar picked up at a jobber's (R. 59b). On one occasion when this was done, Twitty was accompanied by Fesmire (R. 65a; cf. 67a).

In the later part of 1954 and the early part of 1955, Twitty, on three or four occasions, bought five gallon glass jugs in Memphis, Tennessee (R. 27a, 77a, 41b–42b). Clyde Garner accompanied him on at least one such occasion (R. 77a, 66b).

In February 1955, Clyde Garner twice acquired truckloads of 40 pound bags of oak-hickory charcoal in Memphis (R. 25a–26a, 40b–41b). Around March 1955, Twitty, on two or three occasions, brought from 10 to 20 forty-pound bags of charcoal in Lexington, Tennessee (R. 52a–55a, 53b–54b).

On September 8, 1954, federal agents discovered a cache of 63½ gallons of illicit whiskey in a wooded area 150 yards back of Clyde Garner's house (R. 28a–29a, 45a, 42b). A road led from Garner's garden

plot to the site of the cache (R. 42b). On the same day, across the road on property known as Clyde Garner's "old home place," the officers found a distillery, partially dismantled and in process of being moved (R. 43b, 52b). By reason of the amount of ashes and the condition of the still pot, it appeared that the still had been in operation (R. 43b). Fesmire lived in the old home place. The road to the distillery went through his yard and was freshly traveled (R. 48a, 43b–44b).

In October 1954, Sammy Joe Garner bought a 1949 International truck in the presence of Twitty and Fesmire (R. 69a–70a). On October 12, officers looking for Twitty (R. 30a, 34a–35a, 46a, 47b) observed an International truck pull up beside Clyde Garner's house. When the officers drove up behind the truck, Twitty and Sammy Joe Garner ran from the premises (R. 44b–45b). The officers found a ton of sugar in the truck, packed in twenty 100-pound bags (R. 45b). In a shirt which Sammy Garner attempted to hide, there was a note which read "Joe go to John Webb and ask him if Edd May has paid for * * * twenty sacks of S if he says he diden you give him this other note, /s/ Audrey" (R. 45b–46b). The second note read, "Let this boy have 20 I will be in & pay for it Sat. /s/ Audrey Garner" (R. 32a).

On the same day, October 12, 1954, the officers found two stillheads in a vacant house on another tract owned by Clyde and Audrey Garner about a mile from the Garner residence (R. 34a–35a, 47b). The

stillheads had just been made (R. 40a, 47b).[3] On October 19, the officers rechecked the building and were flagged down on the road by Audrey Garner, who walked up to the car juggling some bullets. She said that she owned the house and that she had just placed a lock on the door (R. 40a–41a).

In the fall of 1954, Clyde Garner asked Roy Bailey for permission to put a still on his property, some 10 or 12 miles from Garner's home. Bailey refused. Later, finding three stills on the property, he remonstrated with Garner, who denied that they were his stills and suggested notifying the authorities (R. 80a-83a).

In the latter part of January 1955, Clyde Garner, in a conversation with a member of the Tennessee Highway Patrol, stated that he had been misled by a person claiming to own certain land in Decatur County and had placed two 35-sack pots on the land but had been notified by the Tennessee Valley Authority that it was TVA land (R. 75a–79a, 65b). On May 4, 1955, officers found a 2400 gallon Twitty-type still on TVA land in Decatur County, together with indications of another 2400 gallon still that had been moved out (R. 41a–42a).

In March 1955, officers found and destroyed a still about a quarter of a mile behind Fesmire's residence. In an outbuilding about 20 to 30 feet from the house,

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[3] They were of a type found only along the Alabama line until Twitty moved into the area. Hence, the general reference of law enforcement officers to this type of still as an Alabama-type or Twitty-type still (R. 36a–40a, 46a, 47b).

they found 90 gallons of unstamped whiskey in five-gallon glass jugs, together with a stillhead and bottom. Fesmire stated that he rented three rooms of the house from Clyde Garner, but not the outbuilding, or the remaining rooms of the house. In the additional rooms of the house were found ten forty-pound bags of charcoal, two still pumps, and a tarpaulin. While the officers were at the premises, Mrs. Garner came up (R. 70a–72a, 62b). Fesmire subsequently pleaded guilty to possession of 90 gallons of non-tax-paid whiskey and was sentenced to 11 months and 29 days of imprisonment (R. 49a, 72a). Mrs. Garner was on his appearance bond, showing assets of $25,000 value in two farms in Henderson County, Tennessee (R. 63b).

In June 1955, Clyde Garner purchased more than 300 feet of cypress and poplar (R. 67a–68a). In the same month, Clyde Garner and Luther came to the home of Clarence and Helen Adkins on the Tennessee River near Bath Springs, Decatur County, Tennessee, and inquired as to setting up a still (R. 4b–7b, 20a, 32b). When Adkins refused to have a still set up on his land, the stills were set up about half or three quarters of a mile downstream. A camp for those operating the still was established upstream (R. 21a–23a, 32b). Both sites were inaccessible by road; the men, and materials were transported from the Adkins property by boat (R. 21a, 9b, 32b–34b). Sugar, cypress and poplar lumber, wheat bran, and aluminum were seen transported (R. 21a–22b, 32b). Luther and Twitty were seen with sugar, in 100 pound bags (R. 21a, 32b, 35b). Clyde Garner hauled out a load

of about 50 gallons of whiskey one night in August (R. 24a, 34b).

Twitty and three other men [4] accompanied Garner and Luther on the second visit and stayed from about the last of June into August (R. 20a, 7b–8b). Mrs. Adkins, at the request of Luther, cooked for the men other than Garner and Twitty (R. 9b, 13b–14b). Mrs. Adkins overheard them talk of making whiskey and of Garner's forthcoming visits as constituting pay-day (R. 10b, 17b). Twitty was "in and out" of the area during the three months, two or three times a week, hauling out whiskey in five gallon jugs. Garner was seen on about three occasions (R. 13b, 17b–20b). The still, when found in August 1955, disclosed 6 one-thousand-gallon pots (R. 89a–92a, 72b–74b).

On November 14, 1955, at Lexington, Tennessee, Mayo, with the Garners' check, bought fourteen 100-pound bags of sugar and two 100-pound bags of wheat bran (R. 55a–57a, 55b). The check was written on the wrong bank and, upon inquiry, Audrey Garner changed the name of the bank on the check and signed the revised check (R. 56b–57b). On the same date,[5] officers observed Mayo's truck alongside Clyde Garner's house, loaded with 1,400 pounds of sugar and 200 pounds of wheat bran. They knocked at the house door and called, but despite lights burning inside no one answered. Then Mayo came around the corner of the house, his left hand in his pocket. An officer, knowing

[4] These included Nix and Reves, who with Luther, were named as co-conspirators. All three pleaded guilty prior to trial.

[5] The reference to *October* 14, at R. 50a appears to be in error. Cf. R. 9a.

Mayo to be left-handed, searched him and found a pistol in his pocket. Mayo stated that he had been paid to pick up the sugar in Lexington, Tennessee, and bring it to Garner's house. The officers arrested Mayo and seized the truck (R. 50a–52a).

During the month preceding the instant trial, Clyde Garner came to the witness Clarence Atkins, took him out for a dinner, and plied him with a gallon of beer causing him to get "tight". Garner took him to a lawyer's office where Adkins, who had never learned to read, signed a statement alleging a beating. Adkins had never alleged any beating to Garner or to anyone else. Adkins' wife testified that she had never heard nor seen any physical indications of such an act, or of any threats by the Highway Patrol (R. 27b, 29b–30b, 36b–40b).

Of the petitioners, only Fesmire and Clyde Garner testified. Fesmire stated that, upon arrest in March 1955, he had not told the truth to the officers in denying that the whiskey in the outbuilding was his. He said he had no connection with the still that was discovered at the same time nor with any liquor operations of the remaining defendants. He stated that the charcoal in the house was furnished him by the manager of the "Y" Inn for barbecuing of food for the Inn. (R. 92a–100a, 74b–75b).

Clyde Garner testified that he had had no relationship to any of the liquor transactions. He admitted that he had been convicted of violations of the law on three prior occasions in 1939, 1940, and 1950. He denied that he had ever made any purchase of charcoal, jugs, or sugar, or that he knew

anything of the liquor cache in the rear of his home. He denied that he had ever been at the Adkins' place but admitted that he had induced Adkins to sign a statement for him. He testified that it was Bailey who had discussed putting in a still, rather than he (Garner) suggesting a still to Bailey. He admitted the purchase of lumber but stated that he used it for hog troughs and feeders. He stated that the lock was placed on the outhouse where the stillheads were found because of thefts of fertilizer from it, and that the round wooden discs found there were not stillheads but table tops. He testified that the check given to Mayo was for the purchase of some brood sows. He affirmed that Audrey Garner was his wife and Sammy Joe Garner his nephew, but denied acquaintance or dealings prior to the trial with Nix, Reves, and Luther, and any liquor dealings with Twitty (R. 100a–124a, 76b–77b).

ARGUMENT

1. The facts summarized in the Statement, *supra*, pp. 3–9, refute petitioners' argument that the evidence is insufficient to show their participation in a single conspiracy to violate the federal liquor laws. The record amply supports the conclusion of both courts below that the evidence supports the verdict and the charge of one conspiracy. The Court of Appeals characterized the evidence as "strong and convincing" (Pet. 27). It is clear that Clyde Garner and Twitty were engaged in a large-scale enterprise to operate a number of stills at different times and different places, and that the other petitioners as-

sisted them in various aspects of the operation, knowing that they were part of a larger venture. Their conviction as conspirators was therefore fully justified. *Blumenthal* v. *United States*, 332 U. S. 539, 555–558. "Participation in a criminal conspiracy may be shown by circumstantial as well as direct evidence." *Delli Paoli* v. *United States*, 352 U. S. 232, 236, fn. 4, and the cases there cited.

In the case of Fesmire, the fact that he perforce left the conspiracy when he was imprisoned on the substantive charge of March 1955, does not absolve him from liability for his role in the conspiracy up to that time, which was well within the period of limitations. It is, of course, established law that a conspirator may join or leave a conspiracy before its beginning or end. As for Audrey Garner, the evidence points to more than acquiescence in her husband's activities. Not only did she use the wealth in her name in the enterprise, but she herself directed purchases of sugar. These facts, together with her conduct when she informed the officers that she owned and had locked the house in which stillheads were found, justified an inference that she was a knowing and active participant in the conspiracy. Sammy Garner and Mayo were both shown to have engaged in the hauling of sugar under circumstances which showed that they knew they were part of an illegal venture.

2. The court commenced its charge to the jury as follows (R. 79b–80b):

> Gentlemen of the jury, the indictment in this case, which, as you understand, I am sure, is a

means only by which the defendants are brought before this court and this jury for trial, charges the defendants, and each of them, entered into a conspiracy to violate certain Internal Revenue statutes of the United States, and, in pursuance thereof, and as a means of carrying out the same, one or more of the defendants committed certain overt acts to effect the objects and purposes of the conspiracy.

The indictment, which is a rather lengthy one, will be furnished you in the jury room for your convenience.

You will observe from it that the particular offenses against the Internal Revenue laws, which it is alleged the defendants conspired to commit are set out in the indictment. * * *

The court then continued with a summary of the charges and with instructions, *inter alia,* concerning the nature of conspiracy, the government's burden of proof, reasonable doubt, credibility of witnesses, circumstantial and direct evidence, alibi, and identification of persons. In the course of these instructions, the court contrasted the "contention" of the government and the conspiracy "charged" with the jury's function of considering the "evidence" (R. 87b).[6]

[6] The text, here, is as follows (R. 87b):

"Gentlemen of the jury, it is the contention of the Government in this case that on or about September 1, 1954, and continuously thereafter up to and including the date of the indictment herein, the defendants on trial and others not now on trial, entered into and participated a conspiracy * * * and that during the course of such conspiracy one or more of the defendants did commit certain overt acts referred to in the indictment, to effect the object and purposes of the conspiracy, combination and agreement aforesaid.

"If, after a careful consideration of the evidence in this case

Again, the court contrasted a fact "sought to be established" by the government with the requirement, as to circumstantial evidence, that the circumstances "shown in the evidence" must reasonably give rise to an inference of the fact (R. 91b). References to the conspiracy "charged" or "alleged" appear throughout the instructions.

At the close of the instructions, petitioners excepted to the failure to give the following requested instruction. (R. 135a):

> The Court is permitting you to take to the jury room with you the indictment in this case; but you are *again* instructed that the indictment itself is not evidence of the guilt of the accused persons. [Emphasis added.]

Petitioners' argument (Pet. 19–21) that refusal to give this requested instruction constitutes prejudicial error is fully answered by the opinion below (Pet. 27):

> Considering the instructions in their entirety, we think the substance of the requested instruction was covered in the general charge and that the jury understood therefrom that the appellants could not be found guilty until the Government established such guilt beyond a reasonable doubt by evidence produced at the trial without consideration of the indictment itself. *Watts* v. *United States*, *supra*, 212 F. (2d) 275.

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and the instructions as here given you by the Court, you find beyond a reasonable doubt that the defendants, and each of them, entered into and knowingly participated in the conspiracy charged against them by the Government, you will convict the defendants and report to the Court verdicts accordingly."

C. A. 10th; *Robilio* v. *United States*, *supra*, 291 F. 975, 987, C. A. 6th, cert. denied, 263 U. S. 716.[7]

CONCLUSION

The decision of the court below is correct, and no conflict of decisions is involved. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1957.

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[7] In *Schanerman* v. *United States*, 150 F. 2d 941 (C. A. 3), cited by petitioners (Pet. 20), the trial judge refused to instruct concerning the duty of the jury to refrain from reliance on the indictment as evidence, and he also rejected the language: "An indictment is merely the means of bringing a defendant to trial" (150 F. 2d at 945). In the instant case, this language was embodied in the instructions: "the indictment in this case, which, as you understand, I am sure, is a means only by which the defendants are brought before this court and this jury for trial" (*supra*, pp. 10–11).

APPENDIX

STATUTES INVOLVED

18 U. S. C. 371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> * * * * *

The Internal Revenue Code of 1939, Sections 2803, 2810, 2833–2834, and 2913 (26 U. S. C., 1952 ed.), and the Internal Revenue Code of 1954, Sections 5008 (b), 5174, 5606, 5216 (a), and 5632 (26 U. S. C., 1952 ed., Supp. II), provide in pertinent part:

> [Section 2803] (a) No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits. * * *
>
> * * * * *
>
> (g) Any person who violates any provision of this section * * * shall on conviction be punished by a fine not exceeding $1,000 or by imprisonment at hard labor not exceeding five years, or by both. * * *
>
> [Section 5008 (b)] No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto in such manner as to be broken on opening the container, a stamp evi-

dencing the tax or indicating compliance wi h the provisions of this chapter. * * *

* * * * *

[Section 2810] (a) Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same with the collector of the district in which it is * * *. Stills and distilling apparatus shall be registered immediately upon their being set up.

* * * * *

And every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not so registered, shall pay a penalty of $500, and shall be fined not less than $100, nor more than $1,000, and imprisoned for not less than one month, nor more than two years.

[Section 5174] (a) Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register such still or apparatus with the Secretary or his delegate immediately on its being set up * * *.

(b) Penalty [refers to Section 5601, *infra*].

[Section 2833] (a) Any person who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offense, be fined not less than $100 nor more than $5,000 and imprisoned for not less than thirty days nor more than two years. * * *

[Section 5606] Any person who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offense, be fined

not more than $5,000 and imprisoned not more than 2 years. * * *

[Section 2834] No mash, wort, or wash, fit for distillation or for the production of spirits or alcohol, shall be made or fermented in any building or on any premises other than a distillery duly authorized according to law; and no mash, wort, or wash so made and fermented shall be sold or removed from any distillery before being distilled; and no person, other than an authorized distiller, shall, by distillation, or by any other process, separate the alcoholic spirits from any fermented mash, wort, or wash; and no person shall use spirits or alcohol in manufacturing vinegar or any other article, or in any process of manufacture whatever, unless the spirits or alcohol so used shall have been produced in an authorized distillery and (except in the case of vinegar) the tax thereon paid. Every person who violates any provision of this section shall be fined for each offense not less than $500 nor more than $5,000, and be imprisoned not less than six months nor more than two years. * * *

* * * * *

[Section 5216] (a) (1) No mash, wort or wash, fit for distillation or for the production of spirits or alcohol, shall be made or fermented in any building or on any premises other than a distillery duly authorized according to law; and no mash, wort, or wash so made and fermented shall be sold or removed from any distillery before being distilled; and no person, other than an authorized distiller, shall, by distillation, or by any other process, separate the alcoholic spirits from any fermented mash, wort, or wash; and no person shall use spirits or alcohol in manufacturing vinegar or any other article, or in any process of manufacture whatever, unless the spirits or alcohol so used shall have been produced in an authorized distillery and (except in the case of vinegar) the tax

thereon paid or determined as provided by law. * * *

* * * * * *

(b) Penalty—[refers to Section 5608, *infra*].

[Section 2913] Whenever any person removes, or aids or abets in the removal of, any distilled spirits on which the tax has not been paid, to a place other than the internal revenue bonded warehouse provided by law, or conceals or aids in the concealment of any spirits so removed, or removes, or aids or abets in the removal of, any distilled spirits from any such warehouse authorized by law, in any manner other than is provided by law, or conceals or aids in the concealment of any spirits so removed, he shall be liable to a penalty of double the tax imposed on such distilled spirits so removed or concealed, and shall be fined not less than $200 nor more than $5,000, and imprisoned not less than three months nor more than three years.

[Section 5632] * * * Whenever any person removes, or aids or abets in the removal of, any distilled spirits on which the tax has not been determined or paid, to a place other than the internal revenue bonded warehouse provided by law, or conceals or aids in the concealment of any spirits so removed, or removes, or aids or abets in the removal of, any distilled spirits from any such warehouse authorized by law, in any manner other than as provided by law, or conceals or aids in the concealment of any spirits so removed, he shall be liable to a penalty of double the tax imposed on such distilled spirits so removed or concealed, and shall be fined not more than $5,000, and imprisoned not more than 3 years.

The Internal Revenue Code of 1954, Sections 5601, 5608, 5642, and 7302 (26 U. S. C., 1952 ed., Supp. II), provides in pertinent part:

[Section 5601] * * * Every person having in his possession or custody, or under his con-

trol, any still or distilling apparatus set up which is not registered, as required by section 5174, shall pay a penalty of $500, and shall be fined not more than $1,000, and imprisoned not more than 2 years.

[Section 5608] * * * Every person who violates any provision of section 5216 shall be fined for each offense not more than $5,000, and be imprisoned not more than 2 years. * * *

* * * * *

[Section 5642] Any person who violates any provision of section 5008 (b) * * * shall on conviction be punished by a fine of not more than $1,000, or by imprisonment at hard labor for not more than 5 years, or both. * * *

[Section 7302] It shall be unlawful to have or possess any property intended for use in violating the provisions of the internal revenue laws, or regulations prescribed under such laws, or which has been so used, * * *. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal revenue laws, or of any other law. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1937